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Supreme Court of the United States.

No. 813.

The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, Appellant,

vs.

The Board of Trustees of the Town of Catlettsburg, Kentucky, Appellee.

BRIEF OF DAVID STUART HOUNSHELL,
OF RICHMOND, VA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

The Cincinnati, Pomeroy and Big Sandy Packet Company, Appellant,

vs.

The Board of Trustees of the Town of Catlettsburg, Kentucky, Appellee.

APPEAL IN EQUITY FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY, SITTING IN CHANCERY AT COVINGTON.

The appellants, who are the plaintiffs below, are a company incorporated under the laws of the state of Ohio, having their principal office at the city of Cincinnati, in said state. The defendants, the Board of Trustees of the town of Catlettsburg, are a town incorporated by the state of Kentucky, situated on the Ohio river, in said state. The appellants are and were at the time of the grievances hereinafter mentioned, the owners of twelve vessels propelled by steam duly registered and licensed under the authority of the United States to carry on the coasting trade, and each of a tonnage of more than one hundred tons, engaged in the transportation of passengers and freight on the Ohio river, and the states bordering thereon; and to and from the said ports of Cincinnati and Catlettsburg, and at other ports beyond. The

said commerce, so carried on by the plaintiffs, commenced as far back as the year 1870, and has been carried on continuously to the time of the filing of their bill in the court below, and since that date, down to the present time. In the course of said navigation the plaintiffs' boats navigating that part of the Ohio river lying opposite the said town of Catlettsburg.

The boats of the plaintiffs have made frequent landings, within the limits of the said town of Catlettsburg, at the natural and unimproved shore of the Ohio river, on the Kentucky or south side of said river, for the delivery and receipt of passengers and merchandise at the said port of Catlettsburg, as well in their upward as their downward voyages; which landings, according to the best calculations the plaintiffs are able to make, amount in the aggregate, between the years 1870 and 1877, to a total of five thousand and ninety-two, (the exact number is better known to the said defendants,) and for each and every of the said landings, the vessels of the plaintiffs have respectively been subjected, under said ordinance of said town hereinafter mentioned, to a charge or duty apportioned according to the tonnage of said vessels, without reference to the value thereof. The aggregate amount in money of such charges is five thousand and ninety-two ($5,092) dollars, where no services in aid of said navigation were rendered on the part of said defendants. And they made other landings at the improved wharves of the defendants, lying between Division and Main streets of said town, from which last named wharves, public streets, or thoroughfares extend through the said town. The plaintiffs are unable to state the number of landings so made at said improved wharves of the defendants, or the exact sum or sums they were compelled to pay for such use of said wharves, but they allege that the officers and servants of the defendants were required to keep an account of all such landings made either at said improved wharves, as well as at the landings of the unimproved shore, and the sums collected therefrom respectively, and report the same to the treasurer or other proper officer of the defendants, who are required by a special prayer of the bill to produce the same or a true exhibit.

All the questions involved in this case arise upon the pleadings—which consist of an original bill, an amended bill and demurrers to the original bill and amended bill; joinder therein, and

final decree dismissing the bill at the cost of the plaintiffs. Thereupon an appeal was taken and allowed in open court by the said Circuit Court to the Supreme court of the United States; as by reference to the transcript fully appears.

ASSIGNMENT OF ERRORS.

The decree of the Circuit Court should be reversed by the Supreme Court upon the following grounds:

I.

"Because the bill charges that the ordinances of the defendants imposing the charge, tax or duty complained of, constitute commercial regulations prohibited by the first article of the constitution of the United States. The exact language of the bill containing this charge is as follows:

"That your orators are advised by counsel, and so allege, that "the said tonnage tax or duty is a regulation of commerce and a "duty of tonnage, and as such, is unconstitutional and void, and "contrary to the first article of the constitution of the United "States." Vide *Cannon* vs. *New Orleans*, 581; *Inman Steamship Co.* vs. *Tinker*, 94 U. S. Rep., p. 244; *The Northwestern Union Packet Co.* vs. *The City of St. Paul*, 3 Dillon, p. 454; *State Tonnage Tax Cases*, 12 Wallace, p. 204; *The Steamship Company* vs. *The Port Wardens*, 6 Wallace, p. 31; *Pecte* vs. *Morgan*, 19 Wallace, 581; *Gildart* vs. *Gladstone*, 11 East, 675, S. C., 12 East, 440; *Foster* vs. *The Master and Port Wardens of the Port of New Orleans*, 94 U. S. Reps., 246; *Welton* vs. *The State of Missouri*, 91 U. S. Reps., 282; *Railroad Company* vs. *Husen*, 95 U. S. Reps., 465.

II.

Because the said ordinances require the said charge, tax or duty, to be paid for merely passing from the water highway on the Ohio river to the land highway connecting therewith and leading directly through the town of Catlettsburg to the interior of Kentucky. Vide *Hogg et al.* vs. *Zanesville Canal and Manufac-*

turing Company, 5 Hammond, 410; *Fowler* vs. *Mott*, 19 Barbour, 204; *George B. Russell* vs. *The Brig Empire State*, 1 Newberry's Admiralty Reports, 541; *The Illinois River Packet Company* vs. *Peoria Bridge Association*, 38 Illinois Reps. 467.

III.

Because the said ordinances require the said charge, tax or duty to be paid by the plaintiff's boats for merely arriving at the port of Catlettsburg, or landing at said port at the natural and unimproved shore of the Ohio river. The exact language of the plaintiffs' bill containing the charge is in these words:

"Your orators further state that within the port of said town "of Catlettsburg there is a natural and unimproved shore of the "Ohio river, convenient and in every way suitable for landing "your orators' boats, and that after the 1st day of January, 1870, "and before the 30th day of April, 1877, your orators made at "the natural and unimproved shore of the Ohio river five thou- "sand and ninety-two landings (5,092) with their said boats at "the port of Catlettsburg, at points other than at the improved "landing of the defendants, between Main and Division streets, "and for each of said landings were subjected by said defendants "to an illegal tax, proportioned to the tonnage of each of said "boats, at the rate of one dollar for each landing, which said "taxes were wrongfully and without right exacted and collected "from your orators against their will by the said defendants; and "that the said defendants, under their several ordinances bearing "date February 23d, 1871, and May 5th, 1873, the same set forth "in your orators' original bill, have claimed and still claim the "right to exclude your orators from the port of Catlettsburg "unless they pay said illegal taxes aforesaid; and your orators "are advised and charge the fact to be that said ordinance of the "5th of May, 1873, is violative of your orators' rights, and an "oppressive grievance to them."

Vide *Vicksburg* vs. *Tobin*, 100 U. S. Reps., p. 433. Justice Harlan in this case says: "It is contended that this ordinance, in "explicit language, imposes a tax for merely landing *at the city*,

"and points on the shore where there may have been in fact no "wharf. If the ordinance was susceptible of that construction, a "question would be presented for our determination altogether "different from the one before us. Clearly, the city could not "collect wharfage for the use of the unimproved shore of the "river, or for that which was not, in any fair business sense, a "wharf." Vide also *Packet Company* vs. *St. Louis*, 100 U. S. Reps., 423; *Packet Company* vs. *Keokuk*, 95 U. S. Reps., 80; *Guy* vs. *Baltimore*, 100 U. S. Reps., 434.

IV.

Because the said ordinances require excessive charges, taxes and duties to be paid for the use of the improved wharf of the defendants, to an extent greatly exceeding the value of any facilities or accommodations afforded the plaintiffs in aid of navigation, thereby creating a general revenue fund for the town of Catlettsburg, in nowise connected with said wharf, and greatly in excess of the cost of the original construction of said wharf, or the keeping the same in repair, and to the obstruction and injury of navigation on the Ohio river. The language of the bill containing this charge is as follows:

"Your orators further state that the said taxes so imposed by "the said defendants were, and are excessive, and much beyond "any reasonable charges, for the use of said wharf by your "orators' boats, and tend in a great degree to obstruct the navi-"gation of said river; that, in fact, the amount already collected "for the use of said wharf as aforesaid greatly exceeds the cost "of erection and the continuance of the same and that said taxes "so collected by the defendants, have been and are now con-"tinued to be appropriated as a general revenue fund to other "purposes of said city, in no way connected with said wharf im-"provements."

The illustrious Sir Matthew Hale in his treatise, entitled *De-portibus Maris*, (vide 1, Hargrave's Law Tracts, 78,) in discussing like charges, says:

"A man, for his own private advantage, may, in a port or town,

"set up a wharf, or crane, and take what rates he and his cus-
"tomers can agree for cranage, wharfage, housellage, pesage, for
"he doth no more than is lawful for any man to do, viz: makes
"the most of his own. If the king, or subject, have a public
"wharf, unto which all persons that come to that port must come
"and unload or load their goods, as for the purpose, because they
"are the wharfs only licensed by the queen, or because there is
"no other wharf in the port, as it may fall out where a port is
"newly erected, in that case there cannot be taken arbitrary and
"excessive duties for cranage, wharfage, pesage, &c.; neither can
"they be enhanced to an immoderate rate, but the duties must be
"reasonable and moderate, though settled by the king's license
"or charter. For now the wharf and crane and the other conve-
"niences are affected with a public interest, and they cease to be
"*juris privati*, only, as if a man set out a new street, in new build-
"ing on his own land, it is now no longer bare private interest,
"but is affected by a public interest."

Vide, also; *Munn* vs. *Illinois*, 94 U. S. Reps., p. 123; *Bolt* vs. *Stennett*, 8, Tr. Rep., 606; *Allnutt* vs. *Ingliss*, 12 East's Reps., 527.

V.

Because said ordinances require said charge, tax or duty for bare moorage, anchorage or landing at the port of Catlettsburg, where no use of defendant's wharf has been had, the same as where the wharf has been used, without the authority of, and in violation of section 31, of the Charter of the town of Catlettsburg, approved by the General Assembly of Kentucky, January 28, 1868, which invests the defendants with the power "To erect, "make and repair wharves and docks, and to regulate and fix the "rate of wharfage thereat; to regulate the stationing or anchor-"ing of vessels or boats or rafts within the town limits, and the "depositing freight or lumber on the public wharves." Vide, *Stephens* vs. *Coster*, 3 Burrow, 1408; 1 Blackstone Rep., 413, S. C.; *The Gem*, 1 Brown's Admiralty Rep. 37.

Espinasse's *Nisi Prius*, vol. 1, p. 9, gives the original act of Parliament, under which the case of *Stephens* vs. *Coster* arose. The language is as follows;

"That the rates for cranage and wharfage on the river Thames "shall be assessed and allowed by his Majesty and Privy Council, "and no others be taken, and obliges wharfingers under a penalty, "not to refuse to suffer any goods or merchandise to be landed "or shipped at or from such wharf."

Vide, 22 Char. 2, C. 11, S. 21, and in commenting upon the case this learned author says:

"It was resolved in this case, that where an order of Council "has been made pursuant to that statute regulating the rates of "cranage and wharfage. That where a vessel was fastened to the "wharf such rates were recoverable by action of assumpsit, as far "as the wharf or crane were used, and therefore it was to be paid "only for goods *actually landed*, and for which the wharf had "been used: not for goods taken from on board the same vessel, "and carried off in lighters while she lay at the wharf." Espinasse's *Nisi Prius*, vol. 1, page 9.

After an insuructive argument by Sir William Blackstone, in the great leading case of *Stephens* v. *Coster*, Lord Mansfield, in a masterly opinion, says:

"Fourthly, The particular circumstance stated in the present "cause is that 'Whilst the vessel was and remained moored and "'fastened to the wharf, the goods and merchandise were put on "'board lighters brought to lie alongside of her, but never landed "'on the wharf.'

"Some propositions are so plain and clear in themselves that "nothing can render them more so; and one is, therefore, under "a great deal of difficulty in what manner to form any argument "upon them.

"If any duty of wharfage or cranage is payable to the plain-"tiffs upon those goods thus put on board lighters, it must arise "upon this act of parliament; on which alone their claim to any "such duty is founded.

"And a duty of wharfage and cranage can not be due where "the party has not had the use of crane or wharf. Wharfage is "due for landing on the wharf, and cranage for the assistance of "the crane. Anchorage and moorage are very different things.

"If any injury has been done to the wharfingers by lying be-"fore their wharf, or by fastening the vessel to it without right, or "in any other way whatever, they may have their remedy in an-"other method, but not under this act of parliament, which "relates only to wharfage and cranage, and gives the duty for "them only.

"It has been argued on the part of the wharfingers, that 'at "'the wharf' must bear a different meaning from 'upon the wharf,' "and that every vessel coming to the wharf and landing some of "its goods upon it, putting the other part upon a lighter, is liable "to the duty for that other part which is only put on board the "lighter; but they might as well contend that a vessel coming "and lying before the wharf, without even mooring or fastening "to it, should be liable for wharfage."

Again he says:

"Clearly, the present case was neither within the idea of the act "of parliament, nor the order of Council; nor would the legisla-"ture have given the same duty for this if they had really meant "to give any, as they give for landing the goods upon the wharf; "they would certainly have given a smaller duty for this alone, "because the duty must still be paid again, whatever wharf they "shall at last be landed upon. We cannot suppose that they will "be landed at private stairs, or free wharves; for goods consumed "in the port of London must, in general, be landed upon some "wharf, where such are usually landed, and it must be a very in-"considerable proportion that one can imagine to be landed else-"where."

In *The Gem*, 1 Brown's Admiralty Rep., 37, the United States Circuit Court for the district of Michigan held, that:

"Wharfage may be claimed either upon an express or an im-"plied contract: express, when a price is agreed upon for the use "of the wharf; and implied, when used without such agreement. "Strictly speaking, it is money due or money actually paid for "the privilege of landing goods upon, or loading a vessel while "moored, from a wharf. The occupation, by anchorage or oth-"erwise, of a navigable river, open to all, in the vicinage of a

"wharf, implies no contract of wharfage, because it is no use of "the wharf for either the landing or the reception of passengers "or merchandise." (Vide also note to this decision, 1 Brown's Admiralty Reports, 38, treating of wharfage as a maritime contract.) *Ex parte* 95 U. S. 68.

VI.

Because the said ordinances allow and encourage a multiplicity of suits for one and the same cause of action, which leads to vexatious contention and oppression, thereby giving equitable jurisdiction for relief.

The language of the bill containing this charge is in these words:

"And your orators further state, that they are obliged to seek "the protection and interference of this Court, and to invoke its "jurisdiction in their behalf, for the reason that the claim of the "defendants to levy said illegal exactions is a continuing claim, "and will be exercised by the defendants to the great and irrepa- "rable injury of your orators, in the navigation of the Ohio river "by their said boats, unless the said defendants are prohibited "therefrom by the restraining orders of this court; and that your "orators' remedy at law would be wholly inadequate and lead to "a great multiplicity of suits to be brought by them for the re- "peated exactions of said illegal tax."

The jurisdiction in equity, under these circumstances, has long been exercised: 1. For an account and discovery. 2. Upon bills of *quia timet* and bills of peace, to prevent a multiplicity of actions, and to avoid complicated litigation and unduly splitting up causes of action.

Section 723 of the Revised Statutes of the United States is in these words:

"Suits in equity shall not be sustained in either of the courts "of the United States, in any case where a plain, adequate and "complete remedy may be had at law."

Vide 1 Spence Eq. Jurisd., 432, 621, and *seq.*

An action at common law, upon the facts set forth in the plaintiffs' bill, would be wholly inadequate. Here an account and discovery both are sought. In the case of *Bruce* vs. *Burdet*, 1. J. J. Marshall, 82, Chief Justice Robertson said:

"A common law suit for an account may be maintained; but "this remedy is almost abolished by desuetude. The chancellor, "by modern practice, takes almost exclusive cognizance of such "cases, and he is certainly more competent to a full and just set- "tlement of unsettled accounts current, than the common law "judge can be. There is no doubt he had jurisdiction in this "case."

In the case of *Bruce* vs. *Burdet*, there was no discovery sought from the defendants. In the case at bar, discovery is of the gravamen of the suit.

Chancery exercises a concurrent jurisdiction with courts of common law in all matters of account. *Ludlow* vs. *Simond*, 2 C. C. E., 1, 38, 52; *Post* vs. *Kimberly*, G. J. R., 470, 493; *Duncan* vs. *Lyon*, 3 J. C. R., 349, 361; *Rathbon* vs. *Warren*, 10 J. R., 587, 595, 596; *The Corporation of Carlisle* vs. *Wilson*, 13 Vesey, 276; *Weymouth* vs. *Boyer*, 1 Vesey, 416; *Dunwiddie* vs. *Kerley*, 6 J. J. Marshall, 503; 1 Story's Equity Jurisprudence, 442, 450, 452, 455, 457.

BRIEF OF APPELLANTS.

In the first place, it is a well established rule, that upon pleadings like these, had in this case all the material facts well pleaded stand admitted as true without proof. (Vide Story's Equity Pleadings, § 452; *Inman Steamship Company* vs. *Tinker*, 94 U. S. Reps., 238.) This case stood upon a decree of dismissal of the bill on demurrer, wherein the court found all the facts set forth in the bill demurred to, as confessed, by the defendants without other proof.

We do not contend that this rule applies to averments or conclusions of law as to which a different rule applies, their truth and correctness not being admitted by the demurrants, and they remain, notwithstanding the demurrer, open for discussion.

(Vide Story's Equity Pleadings § 452.) As to the objections specially set forth in support of the demurrer to the parties, as well to the plaintiffs as the defendants, and to the jurisdiction of the court upon the subject matter, the jurisdiction sufficiently appears, not only in the allegations of citizenship, but also upon the subject matter upon the allegations of a violation of the constitution of the United States in reference to tonnage duties and the regulation of commerce between the states.

We will now proceed to state upon what grounds or pretended authority the defendants rely, or are understood to rely, in support of their acts and proceedings touching the vessels of the plaintiffs and their navigation within the limits of said town of Catlettsburg.

And first in order is the act of the General Assembly of Kentucky, passed and approved January 28, 1868, incorporating said town of Catlettsburg, which said act, in the 31st section thereof, among other things contains the following provision authorizing the Board of Trustees to do and perform certain acts, viz:

"To erect, make and repair wharves and docks, and to regu-
"late and fix the rate of wharfage thereat; to regulate the sta-
"tioning or anchoring of vessels or boats or rafts within the
"town limits, and the depositing freight or lumber on the public
"wharves." (Vide transcript, page 2.)

Also an ordinance passed by the said Board of Trustees of Catlettsburg February 23d, 1871, in the following words:

"The following rates are established as charges upon steam-
"boats and other water crafts landing at the public landing of
"Catlettsburg, Kentucky: On transient steamboats, $1 for every
"landing; on the largest sized regular packets, over 100 tons,
"custom-house measure, $1 for each landing; and on all steam-
"boats under 100 tons burthen, fifty cents for each landing; for
"all store-boats or trading-boats, $1 for each landing, and if they
"remain more than one day, fifty cents per day for each day they
"remain; and for each wharf-boat used for the purpose of wharf-
"age and commission, $10 per month."

And also upon another ordinance adopted by said Board of Trustees May 5, 1873, in the following words:

"That the public landing on the Ohio river, between Division "and Main streets, is hereby appointed and established as a "steamboat landing, and all steamboats arriving at the town of "Catlettsburg shall land at the wharf situate as aforesaid between "Division street and Main street, and at no other point within the "corporate limits of the town of Catlettsburg, except by the "written consent of the wharfmaster of said town.

"That for any violation of the foregoing section the owners, "controllers or masters of any boat so violating shall be jointly "and severally liable to pay a fine of $10 for each offence, which "may be recovered by warrant in the name of the Common-"wealth of Kentucky, for the use of the Board of Trustees of "the town of Catlettsburg.

"It is hereby made the duty of the wharfmaster to enforce this "ordinance, and to report and prosecute all violations thereof."

It will be seen that it becomes material to enquire what constitutes the port of Catlettsburg and the limits thereof on the Ohio river; whether it is confined to the shore line, or southern side of the Ohio river, or extends across said river to the northern or Ohio shore of said river, and to what part of said last mentioned shore.

There is no difficulty in fixing the limits of the port of the town on its southern or Kentucky shore, which of course extends along the entire shore at all stages of the water from one end of the town to the other. As we understand the construction of the authorities the other lines which fix the limits of the port under the ordinance of Congress, passed July 13, 1787, extend from either end of the shore limits on the Kentucky side across the said river to low-water mark on the northern or Ohio shore.

In support of this construction of the ordinance of 1787, we refer in the first place to the case of *Handly's lessee* vs. *Anthony, et. al.*, 5th Wheaton, 374, wherein the point arose in an action of ejectment upon a question of boundary. The opinion of the court in the case was announced by Marshall, C. J., which estab-

lishes the domain of Kentucky as extending to low-water mark on the opposite or Ohio shore of the river.

The case of *Hogg et. al.* vs. *Zanesville Canal and Manufacturing Company*, 5 Hammond, 410. In considering the character of the Muskingum river as affected by the 4th section of the Congressional ordinance of July 13, 1787, the Supreme Court of Ohio say that said ordinance is a compact paramount to the constitutions of the states erected out of the lands or territory ceded by Virginia.

If in the case at bar the court should be of opinion that the limits of the town or port of Catlettsburg extend across the river to the Ohio shore at low-water mark, we then claim that the ordinance of the said town, passed and adopted August 5, 1873, which compels all vessels entering said port to land on the Kentucky side of the river, or to be subjected to penalties, brings this case within the decision of the court, in the case of the *Inman Steamship Company* vs. *Tinker*, cited *supra*.

The Court says:

"In this law of the State there are several important points "which must not be overlooked. The charge is not exacted for "any services rendered, or offered to be rendered, if the vessel "enter the port and immediately take her departure, or load or "unload, or make fast to any wharf, *either of these things dis-*"*junctively brings her within the act, and makes her liable to the* "*burden presented.*"

The instant the vessels in their upward or downward voyages crossed these limits on the river although they may immediately pass without touching either shore, or without the rendition of any service, they are brought within the authority of the town of Catlettsburg, and become subject to the penalties enforced by it. Or if they proceed they lose for the time being the control of their own vessels and their right to the free navigation of the river, and must anchor, or moor, or land under the forced authority of the officers of the appellees. We think we might safely rest our appeal on this point alone if we had no other.

We will next ask the attention of the court to another state of fact.

It is provided among other things in the ordinance adopted by said town May 5, 1875, that vessels landing at that part of said town from which the public streets of the said town called Main and Division streets, lead from the river through the town, the ordinance last aforesaid exacts a tax for all such landings without any reservation of the right to pass from the river along either of these streets, either in the receipt or delivery of freight or passengers, or in other words, from passing from one public highway to another. At this point we refer to the following authorities, viz:

The Supreme Court of New York, in the case of *Fowler* vs. *Mott*, 19 Barbour, 204, in considering the exemption of the public from tolls and charges in passing from a river highway to a land highway connecting therewith, says:

"All our navigable rivers are unquestionably public highways, "free for the passage of all, to their entire extent.

"Our public highways are equally free to all, to the water's "edge, if they extend so far, as it is admitted by all they may. "The question is (if indeed it can be a question), whether it is "not a public common right to pass from one highway to an- "other, when they adjoin each other. If the question is of high- "ways upon the land, there can be no doubt; and what difference "in principle can there be if one is upon the land and the other "upon the water? If there is a line between the two, which is "the property of the riparian proprietor divested of the public "right, it is too narrow to be perceptible. In the case of *Gould* "vs. *The Hudson River Railroad Company*, 2 Selden, 522, the "Court of Appeals decided that the right to pass from the "navigable waters to the adjoining land is public and does not "belong exclusively to the riparian owner, so that he can obtain "a compensation for it when affected or destroyed by a public "improvement. Judge Watson, in giving the opinion of the "court, says that 'among the rights enumerated by the plaintiff's "'counsel, is the exclusive right to embark from his own land "'with all kinds of craft, or to use the natural shore down to "'high-water mark, as a landing place, and to draw nets to his "'shore. These exclusive rights do not belong to the plaintiff

"'because his lands adjoin navigable waters, but because no "'other man can enjoy them, for the reason that if he enters "'upon the appellant's land without his permission, he becomes "'a trespasser.'"

In the case of *George B. Russel* vs. *The Brig Empire State*, 1 Newberry's Admiralty Reports, 541, the Circuit Court of the United States for the District of Michigan, in considering the character of the Detroit river, as affected by the ordinance of the 13th of July, 1787, and the right of the public to pass free of tolls from said river, in and upon the streets of the city of Detroit, uses the following language decisive of the whole question at bar:

"But these streets are not only the dedicated highways of the "city of Detroit, in which the city has no other power than that "of regulation, but as highways they have their declared termini "in connection with another public highway, national in its char- "acter, common to all the inhabitants of the United States, and "by treaty free to the subjects of a foreign power."

"The fourth article of the ordinance of 1787, in declaring the "navigable waters leading into the Mississippi and St. Lawrence, "common highways and forever free, as well to the inhabitants of "the said territory as to the citizens of the United States, and all "the States, 'without any tax, impost or duty,' comprehends the "river Detroit, and negates the right of the United States, or of "any State, or any subordinate power by law or ordinance, to "exact any fee, charges or impost in its navigation. It is free to "all for the purposes of commerce and trade.

"And the ninth section of the act of the 18th of May, 1796, is "not only declaratory of the same; but in making a distinction "between the streams not, and those navigable, where the oppo- "site banks belong to different persons, and enacting that their "beds shall belong and be common to both, clearly manifests the "intention of the law-making power to ordain all rivers actually "navigable as common rivers above the flow of the tide. But "the Court does not consider this issue to involve the right of a "riparian proprietor. The city corporation is not such, and the "river being a national public highway, the city authorities can-

"not appropriate any portion of it to its use so as to obstruct its "free navigation. Its wharves and docks must be so constructed "as not to impair, but facilitate navigation and commerce; and as "such, be open to the landing of all and the moorage of all ves- "sels, 'without tax, impost or duty.'

"The act of dedication of the streets, the declaratory ordinance "of 1787, the treaty of 1794, are all in accordance with this posi- "tion. The streets are free; the river is free. Both may be im- "proved at the expense of the city, for the public benefit, as "streets are graded and paved, but not to the detriment of pri- "vate right thus solemnly and repeatedly established. Any other "construction would seem to frustrate the intention of the dedi- "cation; for, should the city possess the power to wharf and "lease the termini of all the streets communicating with the river, "all access to the city from the latter would be subject to 'tax, "'impost or duty,' in contravention of the ordinance, and the "right of way prescribed by the dedication of 1807.

"The leading case cited in the argument, from 19th Bar- "bour, *Fowler* vs. *Mott*, fully supports this view. The court "there declares that 'our public highways are equally free to all "'to the water's edge, if they extend so far. It is a common "'right to pass from one highway to another, when they adjoin "'each other. Such is the law of highways upon the land; and "'there can be no difference in principle, where one highway is "'upon the land and the other upon the water. Both are free for "'the passage of all.'

"Independent of these considerations, which are conclusive, "the privilege granted to the libellant by the lease, would not "warrant the collection of wharfage. But the lease in giving him "'sole and exclusive right to use the public wharf for his ferry "'boats,' does not authorize him to charge wharfage as to other "vessels mooring there. Conceding the validity of his lease, any "obstruction of his privilege would make the trespasser amena- "ble to another tribunal, and in another form of action."

(Vide also *The Illinois River Packet Company* vs. *The Peoria Bridge Association*, 38 Illinois Reports, 467.)

THE COMMERCIAL EVILS THE CONSTITUTION WAS DESIGNED TO REMEDY.

Indeed it would seem as if little could be added in support of the remaining assignments of error, as each seems to rest upon solid foundations, but the extreme importance of the subjects under consideration imposes some additional observations.

At the time the constitution of the United States was adopted, the Republic abounded with great rivers having their navigable sources in States distant from the seas into which they flowed, and, in their course, passing through numerous States wholly without conventional agreements regulating their commerce. The wise framers of the Constitution, with prophetic foresight, saw the oppressive regulations and innumerable causes of contention that would arise between the States, through which such rivers flowed, growing out of their commerce; and at once recognized the necessity of lodging all power over commerce in the Constitution. They had seen the disputes and contentions arising from the regulation of commerce upon the great continental rivers of Europe, having their navigable sources distant from the sea, and on their way thither flowing through independent and often jealous and hostile States. To avoid such strife and contention here, as well as to facilitate and foster commerce on this continent, was the prime object of their design. In illustration of this subject, Mr. Madison, in number 42 of the *Federalist*, says:

"In Switzerland, where the union is so very slight, each Canton is obliged to allow to merchandise a passage through its jurisdiction into other Cantons, without an augmentation of the tolls. In Germany, it is a law of the Empire, that the princes and States shall not lay tolls or customs on bridges, rivers or passages without the consent of the Emperor and diet; though it appears from a quotation in an antecedent paper that the practice in this, as in other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts disadvantageous to their neighbors, without the general permission."

Vide *Federalist*, No. 22; Virginia Debates, p. 355.

The States have parted with and alienated to the General Government exclusive power over commerce in the following cases:

1. Where the States have delegated to the General Government, by the Constitution, the power to regulate commerce with foreign nations

2. Where the States have delegated to the General Government, by the Constitution, the power to regulate commerce among the several States.

3. Where the States have delegated to the General Government, by the Constitution, the power to regulate commerce with the Indian tribes.

This delegation of the power to regulate commerce by the States to the General Government, has left with each State alone the power to regulate domestic commerce wholly within the limits of such State.

This power over domestic commerce, carried on entirely within the boundaries of a State, is so limited that no State can create tonnage duties at any of her ports, even where the commerce to be affected thereby is strictly domestic commerce.

If, then, the State has any such power as that exercised and claimed by the defendants at the port of Catlettsburg, she must derive it from some other source than the reserved power over her domestic commerce.

But it is claimed that the State derives the power exercised by the defendants at the port of Catlettsburg under her police powers and in the enactment of her inspection laws. This power in a State is limited, and confined to the reserved powers of the State, and can, in no sense, extend to cases where the States have alienated certain powers, by the Constitution of the United States, to the General Government, of an exclusive nature, viz:

1. Where the Constitution of the United States, in express terms, grants an exclusive power or authority to the General Government.

2. Where the Constitution of the United States, in one instance, grants a power or authority to the General Government, and in another prohibits the States from exercising a like power or authority.

3. Where the Constitution of the United States grants a power or authority to the General Government, to which an equivalent power or authority in the States would be absolutely and totally contradictory and repugnant.

Concede, then, that the police powers of a State and her inspection laws may extend to all subjects over which she has not granted an exclusive power to the General Government by the Constitution (of a nature such as the powers granted to the General Government in the above divisions 1, 2 and 3), and the remaining powers reserved to the States may be called her police powers, and her inspection laws may extend to the full measure of such powers; and within that sphere the legislative, executive and judicial powers of the State government may operate, either exclusively or, in some instances, concurrently with the General Government. Subtract, as it were, the powers contained in the divisions 1, 2 and 3, *supra*, from the original powers of the States, and the police powers of the States remain, and may be thus divided:

1. Where the States have not aliened any power by the Constitution to the General Government.

2. Where the States have delegated certain power to the General Government by the Constitution, not of an exclusive nature, and reserved a like power or authority over the subjects to which the Federal power relates.

The powers reserved in the first of the two last divisions, are within the exclusive jurisdiction of the States, and the natural source of their police power and inspection laws. The second division *supra* appertains to a class of powers over which the General Government and the State Governments have concurrent jurisdiction. It may then be asked to which class of powers above enumerated in the five divisions *supra* does the power claimed by the defendants at the port of Catlettsburg belong; and the answer to this question solves the problem we have been discussing. The plaintiffs' bill shows that they are engaged in commerce between the States lying upon either shore of the Ohio river, and that the defendants have attempted to regulate such commerce at the port of Catlettsburg. Inter-State commerce,

therefore, is the subject upon which their exertions operate. The answer, then, to the question is, that the powers exercised at the port of Catlettsburg by the defendants, affecting the business of the plaintiffs, belong to the second division of exclusive Federal powers, and appertain to inter-State commercial regulation. The police powers of the commonwealth of Kentucky and her inspection laws therefore, cannot be made to regulate inter-State commerce at the port of Catlettsburg, without the consent of Congress.

Vide, Sub-section 3, of Section 8, of Article 1 of the Constitution. Sub section 5, of Section 9, of Article 1; Section 10 of Article 1.

The Constitution declares that, "No tax or duty shall be laid "on articles exported from any State. No preference shall be "given, by any regulation of commerce or revenue, to the ports "of one State over those of another; nor shall vessels bound to "or from one State, be obliged to enter, clear, or pay duties in "another."

And this power is clearly excepted from the commission of the administrative authority of all government, both state and federal, and this brings us to the question of wharfage, which is a maritime contract arising from the use of a wharf, and is in no sense a tax.

Taxes and wharfage have different origins. Taxes originate with, and are created by the sovereign power. Wharfage arises from a contract, express or implied, between the citizens or subjects of a government among themselves. Impose a charge or rate by the sovereign power of the State, for the use of a wharf at any port, and compel all vessels to enter at that port and pay such charge or rate, without the consent of the carrier, and it at once becomes a tax, whether called wharfage or by any other name.

It will now be maintained that, to establish a wharf at any port, force the landing of vessels thereat, and impose a charge for such landing and use of the wharf, is the highest act of sovereign power, comprehending the grant of a royal franchise and of exclusive commercial regulation at the port. It is, in other words, the establishment of the port, and conferring the franchise of the port.

At common law, this power is a branch of the royal prerogative. To secure his marine revenue, the King has the prerogative of appointing ports and havens, or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. He is lord of the whole shore, and guardian of the ports and havens, the inlets and gates of the realm. Ships have been seized for putting in at other than legal ports; and confiscation has been denounced as a penalty by statute for landing elsewhere than at established ports. (Vide 1 Blackstone, 264.)

The franchise of the port may be in one, and the soil in another. At common law, a port is the only place where a subject is permitted to unlade customable goods. This privilege constitutes what is called the franchise of the port. To create the franchise of the port is a part of the royal prerogative; but this does not in anywise affect the propriety of the soil. (Vide 3 Coke's Institute, note 205, Hargrave and Butler's edition.)

This power, as regulated by act of parliament, is a fruitful source of revenue to the crown, and in itself is the very essence of commercial regulation. In the case at bar, the defendants have established a public landing. They require all boats and vessels to land thereat; regulate the charges for so landing; denounce against the owners, controllers and masters of the boat or vessel a penalty of ten dollars for each landing elsewhere at the port of Catlettsburg; and provide that the penalty may be recovered by warrant in the name of the Commonwealth of Kentucky, from the alleged offender, for the use of the Board of Trustees of Catlettsburg.

Concede this high sovereign power of laying taxes upon the commerce of the country, to the State or their municipal corporations, and the power to regulate commerce, granted by the Constitution exclusively to the general government, becomes an empty bauble and meaningless sound. The sovereign power creating the franchise of the port, must draw to itself all incidental powers, among which are the regulations of commerce at the port, the amount of duties imposed for the privileges of the port, their reasonableness and the manner of enforcing their collection. Absolute dominion over the inter-state commerce at the port is usurped by the petty local sovereignty, state or municipal; and

the power to lay tonnage duties, imposts and duties on imports and exports, which the constitution expressly denies to the States, again revives, under the new name of wharfage rates, the identical evils the Constitution was designed to destroy.

To say that they may lay reasonable taxes or charges in the nature of wharfage, at a port connecting two highways, one by water and the other by land, will in no wise obviate the difficulty. If the tax be imposed, call it a toll, duty or wharfage, if you please, still it is the evil the Constitution was designed to remedy. There is no more right to charge the boats and vessels approaching such port by water, a tax, than there is to charge the wheeled vehicles approaching the same port by land, upon a public highway forever free.

The grant of power, by the Constitution, to the judicial department of the General Government, by section 2, Article III, of the Constitution, seems to be equally exclusive, so far as the same concerns commercial regulations. That grant is in these words: "The judicial power shall extend to all cases of admiralty and "maritime jurisdiction." This grant to the judiciary was meant to be co-extensive with the grant to Congress of the power to regulate commerce. It extends to all cases of admiralty and maritime jurisdiction arising upon the high seas, upon the lakes, bays, arms of the sea, and navigable rivers.

The exercise of the same power by the numerous States of the Union, would be "absolutely and totally contradictory and repugnant" to these grants, in-so-much as there could be no uniformity of commercial regulation where there was no uniformity of decision in admiralty and cases of maritime jurisdiction. The eminent domain, confessedly abiding in the States of the Union, in nowise conflicts or interferes with the right of undisputed jurisdiction and empire, on the part of the General Government, over all matters appertaining to commercial regulation, embraced within the grant to Congress by the Constitution.

This argument concedes to the common law courts of the States all admiralty and maritime jurisdiction they had at common law, not affecting commercial regulations; but everything touching commercial regulations, whether of a legislative or judicial character, must of necessity belong, under the constitutional grant, exclusively to the General Government. Wher-

ever the power resides to establish ports, commercial regulations and duties, there indeed must be that supremacy or paramount authority called sovereignty, empire or jurisdiction. This power, in all matters appertaining to commercial regulation, has been granted by the Constitution to the General Government, and whatever power exists in government to impose and levy taxes upon its commerce, must abide in the Federal Government. Otherwise the States would impose, under other names, the identical burdens prohibited by the Constitution of the United States.

The distinction, then, between a tax imposed by government and a contract between citizens or subjects of the government among themselves, becomes all-important in the consideration of wharfage. Wharfage is a marine contract between citizens or subjects of the government. In this sense it is in nowise a tax. It is sometimes called the money collected for the use of a wharf, but is more properly a claim for reasonable compensation for its use. At common law an action of *assumpsit* lay for its recovery. Where there is no use of the wharf, there is, of course, no contract upon which to base an action for wharfage; and in all cases, like any other claim or demand, it must be reduced to judgment before its collection can be enforced by process of law.

Taxes, however, stand upon their own foundations, and are tantamount to judgments, and their collection is summarily enforced. They originate with government, and of necessity emanate from sovereign power. Whatever absolute power assesses and levies upon the citizen or subject, by whatsoever name, is a tax. But wharfage, at common law, is a contract. The States cannot make it a tax without an infringement of the Federal Constitution. If they had that power by creating commercial regulations and conferring jurisdiction on State courts to enforce such regulations, the foundations of the Federal power over commerce would at once be sapped, and the constitutional negations of power to the States become nihilities. Everywhere in the land, diversity of commercial regulations would arise, and the ports of States would become custom-houses, as it were, for gathering revenue, for State and municipal purposes, from the commerce of the country.

The States may create ferries, make laws touching the internal police, in short, exercise all powers not delegated to the general

government, nor prohibited by the Federal Constitution, or their own Constitutions, to them. But the power to establish ferries does not carry with it the power to create ports and establish commercial regulations. If the States make sumptuary laws, denying to wharfingers the right to charge above certain fixed rates, and leaving the carrier at liberty to land at the wharf or elsewhere, to use the wharf, or lade and unlade from the shore, in short, to make his own terms with the wharfinger, then no perceivable evil could arise to the general commerce, or the commercial regulations of the country. But the moment the States or municipalities prescribe regulations commanding the carrier, without his assent, to pay fixed rates of wharfage, or incur penalties for their non-payment, or forbidding his landing at ports except at established wharves, and compelling the payment of certain rates created by legislative power, or excluding the carrier from the port, then the commercial oppression the Constitution designed to avoid is established. These exactions are tribute extorted from the carrier for the privilege of landing at the port, and the passengers and freight passing through the gates of the port are made, eventually, to bear the burdens which, in the first instance, are imposed upon the carrier in violation of every constitutional restraint. (Vide, *Henderson, et. al.* vs. *Mayor of the City of New York, et. al., Commissioners of Immigration* vs. *North German Lloyd*, 2 Otto. 259; *Case of The State Freight Tax, Reading Railroad Company* vs. *Pennsylvania*, 15 Wallace, 232; *Passenger Cases*, 7 Howard, 283.)

Remove the commercial regulations of the defendants at the Port of Catlettsburg, and let the State withdraw its hand from the struggle, and the question of wharfage, by common assent, under federal authority, will regulate itself. If the defendants afford any facilities for the lading and unlading of boats, the plaintiffs may avail themselves of such facilities by compensatory returns, to be governed by contract in the interest of commerce. This too is the natural foundation upon which the charge for wharfage rests, and has been so adjudged by the courts of the United States. In the case of *The Gem*, 1 Brown's Admiralty Reports, 37, in considering the subject of wharfage, the United States Circuit Court for the District of Michigan said:

"Wharfage may be claimed either upon an express or an im-"plied contract: express, when a price is agreed upon for the use "of the wharf; and implied, when used without such agreement. "Strictly speaking, it is money due or money actually paid for "the privilege of landing goods upon, or loading a vessel while "moored, from a wharf. The occupation, by anchorage or oth-"erwise, of a navigable river, open to all, in the vicinage of a "wharf, implies no contract of wharfage, because it is no use of "the wharf for either the landing or the reception of passengers "or merchandise." (Vide also note to this decision, 1 Brown's Admiralty Reports, 38, treating of wharfage as a maritime contract.) *Stevens* vs. *Costor*, 1 Blackstone's Rep., 413.

Absolute regulation of inter-state commerce has been usurped by the defendants at the port of Catlettsburg.

The whole river front, without regard to the proprietary right of the soil, has been declared a public landing. All boats and vessels have been required to land at such landing, under heavy penalties denounced against the owners, controllers and masters; and for each landing have been charged a special tax, proportioned to the tonnage of the vessels, without regard to the value of the vessels and their cargoes. Compulsory payment has been exacted, or exclusion of the boats or vessels from the port has been the alternative.

Under all circumstances wharfage, when allowable, must be reasonable.

All the authorities concur in establishing the propositions: 1. That for the use of property affected with a public interest unreasonable and exorbitant exactions cannot be allowed or sustained. 2. That for the use of private property affected with a public interest the compensation shall be limited to the value of the services rendered, or the conveniences afforded the public by the owner, whether such owner be a body politic or a private individual.

In the great Maryland wharf case, 3 Bland, Chy, 370, the court, in speaking of wharfs, on page 374, says:

"As to all such as belong to individuals, or a body politic, "which are affected with a public interest, the wharfage must be "reasonable, and after having been once legally adjusted, cannot

"be enhanced to an immoderate amount. Nor can duties or ton-
"nage of any kind be exacted of ships or goods coming into our
"ports from any other port of the United States, or from any
"foreign country. And, although it had been found expedient to
"collect in the port of Baltimore, and many other ports of this
"Union, as in England, a small duty of tonnage, or port duty, to
"be appropriated to the sole purpose of clearing the port itself
"of all obstructions, and keeping it in good navigable order, and
"for repairing the public wharves; yet even this small duty,
"which might have been considered as a toll paid only for the
"use of the port itself, was held to fall within these Constitutional
"provisions, and not allowable without the consent of Congress,
"which was given to that Act of Assembly by Congress."

In the case of *Munn* vs. *Illinois*, 94 U. S. R., 123, Chief Justice Waite, in delivering the opinion of the court, says:

"Under such circumstances it is difficult to see why, if the com-
"mon carrier, or the miller, or the ferryman, or the inn keeper, or
"the cartman, or the baker, or the hackney coachman; pursues a
"public employment, and exercises 'a sort of public office,' these
"plaintiffs do not. They stand, to use the language of their counsel
"in the 'very gateway of commerce," and take toll from all that
"pass. Their business most certainly tends to a common charge,
"and is become a thing of public interest and use; every bushel
"of grain for its passage pays a toll, which is a common charge,
"and therefore, according to Lord Hale, every such warehouse-
"man ought to be under public regulations, viz: 'that he * *
"'take but reasonable toll.' Certainly, if any business can be
"'clothed with a public interest and cease to be *juris privati*
"'only' this has been, it may not be made so by the operation
"of the Constitution of Illinois, or this statute, but it is by the
"facts."

And in the case of *Allnutt* vs. *Ingliss* 12 East, 527, Lord Ellenborough, C. J., said:

"The question on this record is whether the London Dock
"Company have a right to insist upon receiving wines into their
"warehouses for a hire and reward arbitrary, and at their will

"and pleasure, or whether they are bound to receive them there "for a reasonable reward only? There is no doubt that the gen- "eral principle is favored both in law and justice, that every man "may fix what price he pleases upon his own property, or the use "of it; but if, for a particular purpose, the public have a right to "resort to his premises and make use of them, and he have a "monopoly in them for that purpose, if he will take the benefit of "that monopoly, he must, as an equivalent, perform the duty "attached to it on reasonable terms. The question then is, whe- "ther, circumstanced as this Company is, by the combination of "the warehousing act with the act by which they were originally "constituted, and with the actually existing state of things in the "port of London, whereby they alone have the warehousing of "these wines, they be not, according to the doctrine of Lord "Hale, obliged to limit themselves to a reasonable compensation "for such warehousing? And, according to him, wherever the "accident of time casts upon a party the benefit of having a legal "monopoly of landing goods in a public port, as where he is the "owner of the only wharf authorized to receive goods, which hap- "pens to be built in a port newly erected, he is confined to take rea- "sonable compensation only for the use of the wharf. Lord Hale "puts the case either way; where the king, or a subject, have a "public wharf, to which all persons must come, who come to that "port to unlade their goods, either 'because they are the wharves "'*only licensed* by the Queen, or because there is *no other wharf* "'in that port, *as it may fall out;* in that case (he says), there "'cannot be taken arbitrary and excessive duties for cranage, "'wharfage, &c.; neither can they be enhanced to an immoderate "'rate; but the duties must be reasonable and moderate, though "'settled by the King's license and charter.' And then he assigns "this reason, 'for now the wharf and crane and other conveni- "'niences are affected with a public interest, and they cease to be "'*juris privati* only.' Then were the company's warehouses *ju-* "*ris privati* only at this time?

"The legislature had said that these goods should only be "warehoused there; and the act was passed not merely for the ben- "efit of the company, but for the good of trade. The first clause "says, that it would greatly tend to the *encouragement of the* "*trade and commerce* of G. B., *and to the accommodation of mer-*

"*chants and others*, if certain goods were permitted to be entered "and landed and secured in the port of London without pay- "ment of duties at the time of the first entry: and then it says, "that *it shall be lawful* for the importer of certain goods enu- "merated in table A to secure the same in the *West India* dock "warehouses; and then by S. 2, other goods, enumerated in table "B, may in like manner be secured in the *London* dock ware- "houses. And there are no other places at present lawfully au- "thorized for the warehousing of wines (such as were imported "in this case) except these warehouses within the *London* dock "premises, or such others as are in the hands of this company.

"But, if those other warehouses were licensed in other hands, "it would not cease to be a monopoly of the privilege of bonding "there, if the right of the public were still narrowed and restricted "to bond their goods in those particular warehouses, though they "might be in the hands of one or two others besides the com- "pany's. Here, then, the company's warehouses were invested "with the monopoly of a public privilege, and therefore, they "must, by law, confine themselves to take reasonable rates for "the use of them for that purpose. If the crown should here- "after think it advisable to extend the privilege more generally to "other persons and places, so far as that the public will not be "restrained from exercising a choice of warehouses for the pur- "pose, the company may be enfranchised from the restriction "which attaches upon a monopoly; but at present, while the pub- "lic are so restricted to warehouse their goods with them for the "purpose of bonding, they must submit to that restriction; and "it is enough that there exists in the place and for the commod- "ity in question a virtual monopoly of the warehousing for this "purpose, on which the principle of law attaches, as laid down "by Lord Hale in the passage referred to, which includes the "good sense as well as the law of the subject. Whether the "company be bound to continue to apply their warehouses to "this purpose may be a nice question, and I will not say to what "extent it may go; but as long as their warehouses are the only "places which can be resorted to for this purpose, they are bound "to let the trade have the use of them for a reasonable hire and "reward."

It is clear, therefore, in view of the above authorities, that the proprietary right of the soil upon the shores of the Ohio river does not give the owners thereof the right to exclude carriers from the ports, either by withholding their consent, or by the erection of wharves in front of the port, or by imposing excessive and oppressive rates. This power is exclusive commercial regulation at the port. All the proprietors of the soil can do, is to erect wharves, not interfering with the arrival of boats at the port, and affording accommodations for lading and unlading vessels, of which the carriers may avail themselves or not at their option. The right to the soil between high and low water mark, is subject to the easement of the public. This servitude of the shore is a right in the public, paramount to private or individual interest. This is true of all navigable rivers throughout the United States; but the Ohio river, the Mississipi, St. Lawrance, and thier navigable tributaries, above all other rivers in the land, are protected by compact. Neither the rivers nor their carrying places, which comprehend the points of embarkation and disembarkation, can be burthened by any tax, impost or duty whatsoever. This compact is their shield and protection against local authority, State or municipal, at the points of embarkation or disembarkation, known under the ordinances as carrying-places If it were otherwise, the proprietors of the shore in front of the ports of our navigable rivers, by withholding their consent, would lock up the ports, the very "gates and inlets of the realm," as they have, not inaptly, been called. Writs of *ad quod damnum* would be a prerequisite and *sine qua non* before the great river and land highways could communicate, and fictitious valuations of tongues of land connecting national highways, would be raised to fabulous heights; or masters with keys in their hands at such points would be set over the commerce of the country, exacting continual and enormous tolls. Whatever may be the rule elsewhere, the ordinance of the 13th of July, 1787, has forever guarded these rivers against such evils, unless a fatal lethargy, unmindful of our vital commercial interests, should take possession of our jurisprudence.

Nor can the States or their municipal corporations impose taxes or charges upon the tonnage of the vessel, without the consent of Congress, nor charge for the privilege of landing at the port, nor obstruct the entry at the port. These are commercial

regulations, confided by the Constitution to Federal sway. Whatever squinting certain decisions may contain at the power of the States or their municipal corporations to fix reasonable tolls or taxes upon commerce at the gates of their ports, whenever that question receives the mature consideration which its importance demands, the Courts are bound to say that power belongs to the federal jurisdiction. The power to fix the charges and judge of their reasonableness, draws in its train every other incidental power. What is reasonable at one port, would not be reasonable at another upon the same river; what the municipal corporation might deem reasonable, the Legislature that created it might deem unreasonable; what the Legislature and municipal corporation might think reasonable, the judiciary of the State might pronounce unreasonable; and what the judiciary of the State, the Legislature and the municipal corporation might deem reasonable, the Federal Congress and judiciary might regard as an unreasonable and enormous tax upon the commerce of the Union for the local benefit of a particular State, or its more limited municipal corporation. This power must abide in one government. It cannot co-exist in the States and in the Federal government, without limit in either, without double commercial regulations arising throughout the land, double tax-gatherers drawing their substance from commerce, and every evil the Constitution meant to abolish, finding in every State jurisdiction a friendly hand to maintain, foster and protect it. This construction creates, preserves and renders perpetual these dire commercial evils.

The power to regulate commerce was granted to Congress by the Constitution to establish uniformity of commercial regulation. Its concurrent exercises by the States destroys uniformity, and creates every diversity of regulation. The grant, therefore, to the general government, of the power to regulate commerce, must, of necessity, deny and exclude its existence in the States.

In concluding upon this branch of the argument, amid the general wreck and decay of our foreign commerce, and the oppression which now weighs upon our inland trade, it may not be out of place for the administrative authorities, both Federal and State, of our Republican government, to catch the inspiring genius of that great legislator and philosopher, Montesquieu, and hearken unto these words:

"Commerce is sometimes destroyed by conquerors, sometimes "cramped by monarchs; it traverses the earth, flies from the "place where it is oppressed, and stays where it has liberty to "breathe. It reigns at present where nothing was formerly to be "seen but deserts, seas and rocks, and where it once reigned, "now there are only deserts." (Spirit of Laws, book 21, chap. 5.)

In conclusion, it may be said that wharfs and docks are the approaches which communicate between land and water highways at the shore, and any charges imposed absolutely by government, whether service is rendered to the carriers or not, where they have no option except to land at the wharf or dock, are tonnage duties, and this view is clearly maintained by *Gildart* vs. *Gladstone*, 11 East, 675; *Gildart* vs. *Gladstone*, 12 East, 440.

The general government might make such a charge. It cannot be done by a state, or any authority under the state, without consent of Congress. These conclusions are much aided and simplified by bearing in mind the broad distinction between the unlimited power of a national government like that of Great Britain over its own commerce, and the limited power over the same subject which is reserved by the States of the American Union, from the constitutional grant to Congress of the power to regulate commerce. Great Britain at will can make and enforce whatever port regulations, or taxes, and charges upon commerce, by whatsoever name called, that in her legislative wisdom she may incline to establish. She may discontinue old and open new ports; make any charges whatever upon vessels for either entering or departing from her ports; can impose tonnage duties, charges of anchorage, lighterage, cranage, houseage, wharfage, dockage, pesage, in short, can forever close any of her ports, upon any part of her shore, looking to any point of the compass; in a word, can abolish and discontinue all her ports, because this power resides in every autonomic government. But, on the other hand, each State of the American Union is wholly bereft of all power over the subject of foreign and inter-State commerce; it cannot, without the consent of Congress, lay any duties of tonnage upon vessels plying between ports lying wholly within the body of the State; nor can it impose any tax or duty on imports or exports, except what is absolutely necessary for the execution of its inspection laws.

It cannot, therefore, be doubted that absolute dominion over the subject of commerce in the sense it exists in Great Britain, is nowhere to be found in the United States under our dual system of local and federal government, because, as long as our present Constitution endures, no power exists in this country to lay a tax or duty on articles exported from any State, nor is there any power to be found to give a preference by any regulation of commerce or revenue to the ports of one State over those of another, nor can vessels bound to or from one State be obliged to enter, clear or pay duties in another. These are fundamental regulations, binding upon all governments in the United States, and nothing repugnant thereto can stand the test of judicial scrutiny.

Much confusion from the structure of our government arises from failing to distinguish wharfage from taxes or other port charges, as will be seen.

1. From confounding wharfage with any kind of governmental imposition, such as taxes, duties, customs, imports, tolls, &c. 2 From confounding wharfage with anchorage, moorage, housage, dockage, keyage (quayage), &c. 3. From confounding wharfage with a mere right to enter a port, or to land at a port, or to remain in a port, which are indubitably commercial regulations and tonnage duties. The second of these divisions comprehending wharfage, anchorage, moorage, housage, keyage, appertains to contract, and the mention of any one of the subjects embraced in said division would not suggest in meaning the substance or essence of any other therein contained. The first comprehending every species of governmental imposition appertains to sovereignty, such as taxes, duties, imports, customs, tolls, &c., and embraces a class of taxes which are coinages fresh from the mint of supreme power, and in nowise related to wharfage. The last, comprehending the right to enter a port, or to land at a port, or to remain in a port, appertains to sovereignty and embraces a classification of privileges which flow from supreme power, and are both commercial regulations and tonnage duties.

The appellants, therefore, submit their cause without further argument or citation of authority to this court, with confidence that the decree of the court below should be reversed.

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